No. 76-195

In the Supreme Court of the United States

OCTOBER TERM, 1976

TOBY ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 532 F. 2d 1305.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1976. A timely petition for rehearing, with suggestion for rehearing *en banc,* was denied on June 7, 1976 (Pet. App. B). On July 7, 1976, Mr. Justice Rehnquist denied petitioner's application for an extension of time in which to file a petition for a writ of certiorari (Pet. App. D). The petition was filed on August 10, 1976, and therefore is substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an investigation by a telephone company, involving the interception and recording of certain of petitioner's telephone calls, constituted governmental action violative of petitioner's rights under the Fourth Amendment.

2. Whether the telephone company's disclosure to law enforcement personnel of the results of the company's investigation was improper in the absence of a subpoena requiring such disclosure or other lawful authorization.

3. Whether an affidavit submitted in support of an application for a search warrant established probable cause for the search.

STATEMENT

After a bench trial in the United States District Court for the Central District of California, petitioner was convicted on two counts of wire fraud and one count of conspiracy, in violation of 18 U.S.C. 371 and 1343. He was sentenced to concurrent terms of imprisonment for one year on each of the counts, all but 30 days of which was suspended, and was fined $500. In addition, he was directed to compensate the telephone company in the amount of $2,500 for the illegal use he had made of the company's facilities. The court of appeals affirmed (Pet. App. A) and denied a petition for rehearing with suggestion for rehearing *en banc* (Pet. App. B).

The evidence at trial, much of which was introduced in the form of stipulations, showed that petitioner had engaged in a scheme to defraud the General Telephone Company of monies due for long-distance telephone calls by using an electronic device known as a

"blue box."[1] In March 1974, Walter P. Schmidt, a security agent employed by General Telephone, concluded, based upon his analysis of a computer printout, that someone at petitioner's place of business was using a blue box to make long-distance telephone calls free of charge.[2] On April 4, 1974, Schmidt placed a 2600 Hertz frequency detector on petitioner's telephone line, which confirmed that a blue box was being used. He then placed an additional device on petitioner's line, which recorded on paper the date, time and telephone number dialed and, when triggered by the use of a blue box, recorded the first ninety seconds of each illegal telephone conversation. During the period the latter devices were permitted to operate—from May 6 through May 17—sixteen long-distance telephone calls were placed with the aid of a blue box from petitioner's place of business (Pet. App. A, pp. 2-4).

Schmidt subsequently turned over a report of his investigation to the F.B.I. The report described the procedures Schmidt had followed in confirming the use of

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[1]When attached to a telephone, a blue box permits the user to by-pass the telephone company's billing equipment on long-distance calls and to complete such calls free of charge. To make a call with a blue box, the user dials either the universal number for directory assistance (555-1212) or a toll-free number (one beginning with 800). Once a connection has been achieved, the user pushes a button on the box, which in turn emits a 2600 single frequency Hertz tone, signifying that the calling party has hung up. The blue box permits the user to remain connected to the company's long-distance network, however, and by pushing other buttons, producing different frequency tones, the user can simulate dialing and call any number in the world free of charge (see Pet. App. A, p. 3).

[2]The computer printout showed that all of the calls had been placed from a rotary phone system listed in the name of petitioner's business associate and installed in an apartment used by petitioner as a business office (Pet. App. A, p. 3).

a blue box, listed the number of fraudulent telephone calls he had detected, and identified the subscriber in whose name the telephone at petitioner's place of business was listed. Schmidt later produced, pursuant to a grand jury subpoena, the records, tapes and documents compiled during the investigation. On the basis of these materials, an affidavit was prepared and a search warrant was obtained for petitioner's place of business. Upon executing the warrant, agents of the F.B.I. discovered a blue box disguised as a calculator (Pet. App. A, pp. 4-5).

ARGUMENT

1. Petitioner first contends (Pet. 8-13) that the telephone company's investigation was subject to the Fourth Amendment because of the status of the telephone company as a federally-regulated public utility.

None of the factors discussed by petitioner is sufficient to transform the telephone company's investigation into governmental activity subject to the Fourth Amendment. The mere fact that a privately-owned company may have been operating in interstate commerce, or that certain of its activities may have affected interstate commerce, has never been held to provide a basis for treating the company's actions as governmental in nature. Similarly, the fact that a privately-owned company is regulated by the government does not transform its actions into governmental actions; such transformation occurs only when the company exercises powers, such as the power of eminent domain, which are traditionally associated with sovereignty and have been delegated to it by the government. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351-353. In conducting the investigation at issue here, the telephone company was not acting under a delegation of authority from the government or exercising traditionally sovereign powers. Rather,

the company acted wholly independently of the government in an effort to protect its property rights. Petitioner's contention that the telephone company's investigation was subject to the strictures of the Fourth Amendment therefore must be rejected. See, *e.g.*, *United States* v. *Clegg*, 509 F. 2d 605, 609-610 (C.A. 5).[3]

2. Petitioner also contends (Pet. 16-20) that the telephone company's disclosure to law enforcement personnel of the results of the company's investigation was improper in the absence of a subpoena requiring such disclosure or other lawful authorization. As noted, however, the only material the telephone company voluntarily turned over to law enforcement personnel was an investigative report that described the procedures that had been followed in confirming the use of a blue box, listed the number of fraudulent telephone calls that had been detected, and identified the subscriber in whose name the telephone from which the fraudulent calls were being placed was listed. The material subsequently turned over by the telephone company was in response to a grand jury subpoena.

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[3]Even assuming that the telephone company's actions were governmental in nature, it would not follow that those actions violated petitioner's rights under the Fourth Amendment. The Hertz frequency detector placed on petitioner's telephone line simply confirmed that a blue box was being used. The device subsequently used by the telephone company did intercept and record the first ninety seconds of certain telephone calls— but only those telephone calls placed with the use of a blue box. Petitioner cannot have had any reasonable expectation of constitutionally-protected privacy in such circumstances, since, by using a blue box, he was trespassing on property where he had no right to be. Compare *Katz* v. *United States*, 389 U.S. 347, 352 ("One who * * * pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.").

But even if no subpoena had been used, or assuming that the statutory provisions relied upon by petitioner were applicable to the information contained in the telephone company's investigative summary, petitioner's arguments nevertheless would be without merit. The pertinent provisions of Section 605 of the Communications Act of 1934, as amended, 82 Stat. 223, 47 U.S.C. 605—which govern the conduct of persons "receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire * * * "—prohibit the divulgence of the existence or contents of wire communications except (1) "through authorized channels of transmission or reception" or (2) "as authorized by chapter 119, title 18 [18 U.S.C. 2510-2520]." The complementary provisions of 18 U.S.C. 2517 permit the use by law enforcement personnel of the contents of any wire communication so long as the officer has obtained knowledge of such communication "by any means authorized by [chapter 119] * * *."[4] One of the means of interception and disclosure specifically authorized by chapter 119 is through court order (18 U.S.C. 2516); but, as the phrase "by any means authorized" indicates, chapter 119 makes lawful as well other means of interception and disclosure. Specifically, 18 U.S.C. 2511 (2)(a)(i) provides in pertinent part that:

> [i]t shall not be unlawful under [chapter 119] for an * * * agent of any communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is

[4]18 U.S.C. 2515 similarily permits the admission into evidence at any trial, hearing or similar proceeding of any wire communication unless "the disclosure of that information would be in violation of [chapter 119]."

> a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication * * *.[5]

Petitioner's suggestions to the contrary notwithstanding (Pet. 18-20), the disclosure in the present case by the telephone company's investigator to law enforcement personnel of the results of his investigation complied with 18 U.S.C. 2511(2)(a)(i). The investigator intercepted and disclosed to law enforcement personnel the results of an investigation undertaken by him, "in the normal course of his employment," for the purpose of protecting the telephone company's property rights. As the court of appeals correctly pointed out (Pet. App. A, p. 19):

> This case does not involve unreasonable monitoring * * * . Rather, only fraudulent calls were recorded, the recordings were limited to the initial portion of the calls, and the [monitoring] device was installed only long enough to allow the company to insure that it could sustain a successful prosecution.

3. Finally, petitioner contends (Pet. 14-15) that the affidavit relied upon by the magistrate in issuing a search warrant for petitioner's place of business was deficient because the affiant did not set forth detailed information concerning the reliability of the telephone investigator.

[5]Petitioner's reliance (Pet. 16-17) upon dicta in *Hanna* v. *United States*, 404 F. 2d 405 (C.A. 5), and *Bubis* v. *United States*, 384 F. 2d 643 (C.A. 9), suggesting that a telephone company may not disclose voluntarily to law enforcement personnel information obtained by company investigation of fraudulent use of telephone facilities, is misplaced. Both of those cases were decided prior to the amendment of 47 U.S.C. 605 authorizing the disclosure of communications obtained "by any means authorized by [chapter 119] * * *" (see Pet. App. A, pp. 17-18).

The court of appeals correctly rejected this contention, noting, *inter alia,* that the investigator was named in the affidavit and the results of his investigation were set forth in summary form (Pet. App. A, pp. 20-21). The information contained in the affidavit clearly could not have been supplied by someone without substantial expertise in electronic communications. Thus, read in its entirety, the affidavit sufficiently apprised the magistrate of the basis of the affiant's belief that the information provided by the investigator was reliable.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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